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No. 630

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE BARRETT LINE, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND MISSISSIPPI VALLEY BARGE LINE CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

In the District Court of the United States for the Southern District of Ohio, Western Division

Civil No. 881—Filed October 4, 1944

THE BARRETT LINE, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered July 28, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission.

[1] The Court also filed a *per curiam* opinion and adopted, as its own findings of fact and conclusions of law, those set forth by the Interstate Commerce Commission.

The Commission's order, dated June 18, 1943, denied appellant's applications under Part III of the Interstate Commerce Act for a permit to operate as a contract carrier by water. An appeal was allowed on September 15, 1944, and the appeal papers were served upon appellees on September 19, 1944.

Appellant made application under the "grandfather clause" of Section 309 (f) [2] of the Act for a permit to transport general commodities by water between points on the Mississippi River and its tributaries. As a matter of precaution, appellant also filed an application under Section 309 (g) [3] for a permit to conduct these same operations.

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[2] 49 U. S. C. 909f. This section, after forbidding operations as a contract carrier without a permit from the Commission authorizing such operations, contains the following proviso known as the "grandfather clause":

"*Provided*, That * * * if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, * * *".

[3] 49 U. S. C. 909g. This section, in so far as pertinent, provides that:

"upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the pro-

The only testimony before the Commission related to appellant's past operations.[4] There is no controversy regarding the facts as found by the Commission. From these findings it appears that from January 1, 1936, to August 11, 1942, the only commodities carried by appellant were stone, in bulk, petroleum products, in bulk, and fabricated steel and steel piling. Transportation of the two bulk commodities was found to be exempted from Commission regulation by Sections 303[5] (b)[5] or 303(d)[6] of the Act, and the Commission refused to consider such exempt transportation as giving rise to any rights under the "grandfather clause." No

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visions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act."

[4] The only evidence before the Commission was the testimony of O. Slack Barrett, appellant's president, and an exhibit describing all services conducted by appellant between January 1, 1936, and August 11, 1942. This evidence was not contradicted or rebutted, the protestants offering no proof.

[5] 49 U. S. C. 903 (b). This section provides that:

"Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities."

[6] 49 U. S. C. 903. This section provides, *inter alia*:

"Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of Section 4417a of the Revised Statutes."

handling of fabricated steel and piling, the only nonexempt commodities, was shown since a shipment of such commodities in 1936. The Commission concluded that such transportation of nonexempt commodities afforded no basis for "grandfather" rights for the reasons indicated in the following excerpt from its opinion:

> Under the act "grandfather" rights must be predicated upon a showing of bona fide operations on January 1, 1940, and continuously since. The term "bona fide operations" has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. *What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since.* We conclude that applicant has failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act. [Italics supplied.]

The Commission found, too, that certain other operations under which appellant chartered its vessels to shippers might also be subject to regula-

tion under Part III.[7] But it concluded that these operations likewise did not form the basis for any grant of "grandfather" rights, with the following statement:

> However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager showing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations.

With respect to appellant's application under Section 309 (g) the Commission made the following findings and conclusions:

> Applicant, however, is not proposing any new operation. In fact, most of its equipment at present is being used in the trans-

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[7] This is by virtue of the following definition of "contract carrier by water" found in Section 302 (e) of the Act (49 U. S. C. 902 (e)):

"The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation. The furnishing for compensation (under a charter, lease, or other agreement) of a vessel; to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.'"

portation of bulk petroleum products. We recognize the fact that this present petroleum movement is an emergency operation occasioned by the war but even considering applicant's normal operations for a period of approximately 5 years before the war it has not shown that its operation consisted of performing other than exempt transportation, except for the one shipment of fabricated steel and piling in 1936. No evidence was submitted to show that present or future public convenience and necessity require operation by applicant in the performance of transportation subject to the act. On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation.

Appellant makes four principal attacks on the Commission's order: (1) That the Commission erred in holding that it was not in bona fide operation as a contract carrier within the meaning of the Act on the "grandfather" date, January 1, 1940, because its operations on that date were all of a type exempt from regulation under the Act; (2) that the Commission improperly failed to take into consideration the fact that for a long period of time prior to the "grandfather" date it had engaged in transportation of a variety of goods not exempt from regulation under the

Act; (3) that the Commission erred in holding that, despite the fact that it engaged in certain chartering operation on the "grandfather" date, it was not in bona fide operation as a contract carrier by water; and (4) that the Commission improperly denied its application under Section 309 (g) since the record shows beyond doubt that continued operation by it would be consistent with the public interest and the national transportation policy.

It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

1. It is obvious from the statutory language of Part III that the Commission properly held that an applicant cannot establish any rights under the "grandfather clause" when it was exclusively engaged in non-exempt transportation during the "grandfather" period. Under the "grandfather clause" of Section 309 (f) an applicant must establish that it was "in bona fide operation as a 'contract carrier by water'" on and continuously after the "grandfather" date. Section 302 (e) defines the term "contract carrier by water" for purposes of Part III as meaning one "which, under individual contracts or agreements, engages in the *transportation* * * * by water of passengers or property in interstate or foreign commerce for compensation." [Italics supplied.] But the exemption provisions of Section 303 (b) and (d),

found applicable here, specifically state that "nothing in this part shall apply to the transportation * * *" (thereafter described). Consequently, an applicant which performed only operations of the exempt type was not performing "transportation" within the meaning of the Act. It follows from this that such applicant to that extent was also not a "contract carrier by water" as defined in the Act, and that it was therefore not in "bona fide operation as a contract carrier by water" within the meaning of the "grandfather clause" of Section 309 (f). The Commission's action in denying the permit here because only exempt operations were conducted during the "grandfather" period is also in accord with its consistent practice in earlier cases.[8] Such consistent and long-standing administrative construction of a statute, particularly when it is a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion and of making the parts work efficiently and smoothly while they are yet untried and new," is entitled to great weight.[9]

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[8] *Union Sand and Gravel Co. Application*, 250 I. C. C. 141; *McCarren Towing Line, Inc., Contract Carrier Application*, 250 I. C. C., 168; *Ralph Raike Applications*, 250 I. C. C. 177, 178; *Carroll Towing Co., Inc., Contract Carrier Application*, 250 I. C. C. 417; *Bronx Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 614, 615.

[9] *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Associations*, 310 U. S. 534, 549.

2. The Commission also properly concluded that certain nonexempt transportation by appellant, conducted long before the "grandfather" date, afforded no basis for granting appellant any "grandfather" rights. Inasmuch as Congress selected January 1, 1940, as the critical date under the "grandfather" clause, the Commission was not at liberty to base a permit under that clause upon operations last conducted well before that date. This Court has frequently recognized that the comparable "grandfather" clause relating to motor carriers, being an exemption from a remedial statute, is to be construed as extending only to carriers plainly within its terms.[10] While the Commission recognized that it might look to operations conducted within a reasonable time prior to January 1, 1940, it concluded in the present case that but one shipment of a nonexempt nature made in 1936 and others at an indefinite period prior thereto were entirely too remote to establish bona fide operations of a nonexempt type on January 1, 1940. Such conclusion is again in complete accord with the Commission's uniform course of decision in other proceedings,[11] and its correctness seems obvious.

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[10] *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83; *Crescent Express Lines* v. *United States*, 320 U. S. 401, 409.

[11] The Commission has held that shipments one year before the "grandfather" date are too remote. *Thomas River Line, Inc., Common Carrier Application*, 250 I. C. C. 245, 246. Likewise, 1938 has been held too remote. *C. K. Willis Con-*

3. Although it appears that appellant in its chartering operations was by virtue of Section 302 (e) engaging in transportation as a contract carrier "as to the vessels so furnished", the Commission was also justified in denying appellant a permit to continue such operations, because no showing was made as to the nature of the services rendered, the commodities carried in, or the points served with the vessels. Section 309 (g) requires the Commission in granting any permit to specify the business of the carrier and the scope thereof. It is settled by this Court's decision in *Noble* v. *United States*, 319 U. S. 88, 92, dealing with identical language in Part II of the Act with respect to contract carriers by motor vehicle, that the Commission in so specifying the business in a "grandfather" case must endeavor to preserve substantial parity between future operations and prior bona fide operations.[12] The same case holds[13] that "an accurate description of the 'business' of a particular contract carrier and the

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tract Carrier Application, 250 I. C. C. 179, 181; *Tennessee Valley Sand & Gravel Co. Common Carrier Application*, 250 I. C. C. 599, 602. It has also held 1937 too remote (*River Sand & Gravel Co. Contract Carrier Application*, 250 I. C. C. 370), as well as 1936. *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106, 107.

[12] The same is held with respect to the "grandfather clause" relating to common carriers by motor in *Alton R. Co.* v. *United States*, 315 U. S. 15, 22; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 481; *Crescent Express Lines* v. *United States*, *supra*, 409.

[13] 319 U. S. 88, 91.

'scope' of its enterprise may require more than a statement of the territory served and the commodities hauled." Obviously the Commission cannot carry out the mandate of the above section where the record, as here, was totally barren of information as to the exact nature of the services rendered, the commodities carried in, or the points served with the vessels during the "grandfather" period. Appellants have in this respect failed to satisfy the heavy burden of proof thrust upon them under the "grandfather clause".[14] Furthermore, even if these chartering operations had been considered as supporting some "grandfather" rights, they obviously would not, under the above criterion of substantial parity between past and future operations, have justified a permit to appellant to engage in transportation, in the more orthodox sense, of general commodities. That was the broad nature of the permit appellant sought and the only type permit it has ever indicated a willingness to accept.

4. The Commission's denial of the application under Section 309 (g) because the record did not establish that public convenience and necessity required appellant's operations as a common carrier of general commodities or that such operations as a contract carrier would be consistent with the public interest and the national transportation policy, must also be sustained. What is required by the public convenience and neces-

[14] See cases cited in footnote 10, *supra*.

sity and what is required by the public interest are both ultimate questions of fact for the expert judgment of the Commission, whose determination thereof will not be set aside if supported by a rational basis and substantial evidence.[15] Though the meaning of "public convenience and necessity" and "public interest" is not identical, both have reference to the public need for adequate transportation.[16] Here there was no evidence by shippers as to any need for any new operations by appellant, nor was there any showing of inadequacy of the existing transportation facilities. The only evidence as to public convenience and necessity or public interest here was the fact that appellant had in the past been in operation. Although the Commission has considered continuous past operations as an indication that public convenience and necessity or public interest required continuance of such operations, that was in the case of nonexempt operations of the type for which operating authority was sought.[17] Here

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[15] *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, 42; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146; *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215 (D. C. E. D. Pa.), affirmed *per curiam*, 317 U. S. 587; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88.

[16] *Chesapeake & Ohio Ry.* v. *United States*, *supra*, 42; *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25; *Werner Extension*, 9 M. C. C. 267, 268.

[17] *Reidville Oil & Guano Co. Contract Carrier Application*, 250 I. C. C. 71, 73; *John L. Goss Contract Carrier Application*, 250 I. C. C. 101, 103; *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 101, 103.

no nonexempt operations had been conducted since 1936. The Commission further points out that though appellant's present exempt petroleum movement is an emergency operation occasioned by the war, even considering its normal operation for a period of approximately five years before the war, there was no showing of non-exempt transportation except for the one shipment of fabricated steel and piling in 1936. Certainly under these circumstances there was a rational basis in the record for the Commission's conclusion that appellant's past operations did not establish any existing public necessity for it to engage in wide scale non-exempt operations or that such operations would be in the public interest.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

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